UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KIMBERLY K. HALEY
United States Air Force

ACM 36308

16 February 2007

Sentence adjudged 29 March 2005 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Colonel David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, Major Sandra K. Whittington, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, MATHEWS, and PETROW
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

The appellant was convicted, in accordance with her pleas, of absence without leave, willful dereliction in the performance of her duties, wrongful use of marijuana, larceny of Air Force property, and breaking restriction to base, in violation of Articles 86, 92, 112a, 121, and 134, UCMJ, 10 U.S.C. §§ 886, 892, 912a, 921, 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 30 months, and forfeiture of all pay and allowances. The

convening authority later reduced the term of confinement to 18 months, approving the remainder of the sentence as adjudged. On appeal, the appellant asserts, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the military judge abused his discretion when he found that the appellant's pretrial confinement was lawfully imposed. We find no merit in that contention and we affirm.

Background

On 5 December 2004, the appellant's commander ordered her into pretrial confinement for being absent without leave in violation of Article 86, UCMJ. In a memorandum dated 6 December 2004, the commander provided the factual basis for his request for continued pretrial confinement. On 7 December 2004, the duly appointed Pretrial Confinement Reviewing Officer (PCRO) held a hearing, pursuant to Rule for Courts-Martial (R.C.M.) 305(i)(2), to review the necessity for continued pretrial confinement. Following the hearing, the PCRO prepared a memorandum in which he concluded that the appellant should be continued in pretrial confinement. At trial, the appellant moved that she be granted additional administrative credit against her sentence for illegal pretrial confinement in violation of R.C.M. 305. After entering extensive findings of fact and conclusions of law on the record, the military judge denied the appellant's request.

In support of her claim of error, the appellant first contends that her commander was not "neutral and detached" for purposes of R.C.M. 305 when he ordered her original entry into pretrial confinement. This is premised on the fact that he previously imposed nonjudicial punishment upon the appellant, served as the accuser as to the court-martial charges, ordered her restricted to base, and witnessed one of the charged offenses. The appellant also asserts that neither her commander nor the PCRO considered lesser forms of restraint before placing and keeping the appellant in pretrial confinement.

Neutral and Detached Officer

We review a military judge's determination regarding the legality of an appellant's pretrial confinement under an abuse of discretion standard. *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996). Although this Court is authorized to find facts under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we normally defer to the military judge unless the lower court's findings are clearly erroneous. *United States v. Hall*, 54 M.J. 788, 790 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 432 (C.A.A.F. 2002).

At trial, the military judge determined the appellant's commander was a neutral and detached officer for the purposes of R.C.M. 305. In his extensive findings on the record, the military judge determined the appellant's commander had not become personally involved in the gathering of evidence, or otherwise demonstrated personal bias or involvement in the investigative or prosecutorial process against the appellant. We

agree. There is no evidence in the record indicating the appellant's commander engaged in any activities with regard to the appellant that were beyond those functions normally associated with command, and certainly none that could be reasonably construed as being within the realm of law enforcement. This Court previously held that a commander was neutral and detached, for purposes of the initial confinement order and decision to continue confinement, even though the commander later preferred charges against the accused, absent evidence of record to suggest the commander was either directly or particularly involved in the command's law enforcement function. *United States v. Scheffer*, 41 M.J. 683, 693 (A.F. Ct. Crim. App. 1995) (citing *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994)). Furthermore, as discussed more fully below, a hearing by a separate neutral and detached officer, independent of the appellant's commander and appointed in accordance with R.C.M. 305(i)(2), was conducted within 48 hours of the appellant having been placed in pretrial confinement. Accordingly, we find the military judge's findings are supported by the record and do not constitute an abuse of discretion.

Consideration of Lesser Forms of Restraint

When the issue is the legality of pretrial confinement already served, the "reviewing magistrate's decision on the propriety of pretrial confinement will be reviewed by a military judge and this Court solely for an abuse of discretion." *United States v. Gaither*, 41 M.J. 774, 778 (A.F. Ct. Crim. App. 1995).

In his memorandum to the PCRO, the appellant's commander detailed his attempts to utilize lesser forms of restraint with the appellant prior to imposing pretrial confinement:

> A few months ago [the appellant] lived in an apartment downtown. She came under investigation for misuse of a Government-Wide Purchase Card (GPC). During the investigation, [the appellant] began a pattern of failing to go to work or reporting late for duty. While the investigation was pending, [the appellant] was picked up for a random urinalysis and tested positive for marijuana. As a result, she was ordered to move onto base, but she was not restricted to base when she was not working.
>
> [The appellant] continued to have difficulty coming to work, and she was eventually restricted to base. [The appellant] has been assigned extra duties…. She failed to report for duty from 25 Nov to 29 Nov. On Monday, 29 Nov, the First Sergeant reported [the appellant] as AWOL and contacted her family and friends in an effort to locate her. In the afternoon on 29 Nov, [the appellant] called me then reported for her extra duties at about 1700 hours.

> [The appellant] went AWOL again on 2 Dec and remained AWOL until she was apprehended entering Shaw Air Force Base on the afternoon of 5 Dec.

Based on this recitation of facts it is clear that the appellant's commander not only considered lesser forms of restraint, but actually implemented them, apparently to no avail.

On 7 December 2004, the PCRO held a hearing to review the necessity for continued pretrial confinement and determined the appellant should remain in pretrial confinement. In his memorandum he observed:

> Although only a single instance can be substantiated that [the appellant] was off base during her base restriction, it does reinforce her history of failure to go and not following orders. Although difficult to determine the likelihood of [the appellant's] fleeing, it is reasonable to assume this possibility based on two instances of Absence Without Leave in a very short period of time after punishments imposed by an Article 15 and history/escalation of not showing up for work or additional duties.

Regarding other forms of restraint, he concluded as follows:

> The only less severe method of restraint that has not be [sic] tried is arrest. However, arrest is predicated upon the confinee adhering to the restrictions and liberties imposed by orders and [the appellant] has shown a history [of] not following restrictions imposed by others.

In his findings, the military judge determined that the PCRO did not abuse his discretion when he ordered the appellant's pretrial confinement continued, and that his statement, "all less severe forms of restraint have been tried" evidenced consideration of those lesser forms.

Our superior court has held that the decision to continue pretrial confinement was not an abuse of discretion, entitling the accused to additional credit for such confinement, where the accused had a history of flaunting military authority, was facing serious charges, and had recently absented himself without authority. *Gaither*, 45 M.J. at 352. It is clear in the present case that both the commander and the PCRO considered lesser forms of restraint before deciding that the appellant's pretrial confinement should continue. Accordingly, the military judge's findings in this regard were well substantiated and we find no abuse of discretion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator